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IN THE

Supreme Court of the United States

October Term, 1972

FRANK FRANKEL, AGNES EISENBERGER and SONYA BRODY,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals, Second Circuit reversing a decision and order of Hon. Morris E. Lasker of the United States District Court for the Southern District of New York. As we will show herein, a direct and irreconcilable conflict has developed between the Second Circuit on the one hand and the Fourth Circuit and the Court of Appeals for the District of Columbia on the other hand in their respective interpretations of the Freedom of Information Act (5 U. S. C. §552).

Opinions Below

The opinion of the United States District Court for the Southern District of New York, per Lasker, J., is reported at 336 F. Supp. 675, and is set forth herein as Appendix A. The majority and dissenting opinions of the Court of Appeals for the Second Circuit are reported at —— F. 2d ——, and are set forth herein as Appendix B.

Jurisdiction

The Jurisdiction of this Court which entitles the Petitioners to a Writ of Certiorari is based on 28 U. S. C. §1254 (1). The opinion and judgment of the Court of Appeals for the Second Circuit were entered on May 4, 1972.

Questions Presented

1. Does the "investigatory files" exemption of the Freedom of Information Act, 5 U. S. C. §552(b)(7), apply permanently after an administrative agency has terminated its investigation and its enforcement proceeding?

2. Even if the "investigatory files" exemption applies, are records which would normally be available under the rules of discovery subject to disclosure under the "except clause" of §552(b)(7)?

Statute Involved

The Freedom of Information Act (5 U. S. C. §552) provides in pertinent part:

> "(a) (3) . . . each agency on request for identifiable records . . . shall make the records promptly

available to any person. On complaint, the district court of the United States in the district in which the complainant resides . . . or in which the agency records are situated has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. . . . Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way . . .

"(b) This section does not apply to matters that are . . .

(3) specifically exempted from disclosure by statute; . . .

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; . . .

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; . . .

"(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section . . ."

Statement

This suit, under the Freedom of Information Act, 5 U. S. C. 552 ("the Act") seeks to compel the Securities and Exchange Commission ("the SEC") to produce records, principally transcripts of testimony and related exhibits, obtained in its investigation of Occidental Petroleum Corporation ("Occidental") and its president Armand Hammer ("Hammer") for violations of the anti-fraud provisions of the federal securities laws. On March 4, 1971, the SEC filed a complaint, based upon that investigation, against Occidental and Hammer, charging that, commencing in 1966, defendants had violated the federal securities laws. In its complaint, the SEC requested an injunction against further violations. On March 5, 1971, the suit was terminated by a consent decree and the investigation ended. Petitioners are shareholders of Occidental, who have brought a class action suit against Occidental, Hammer and another, for damages arising from the said violations of the securities laws.

Petitioners commenced this suit, under the Act, on May 27, 1971, after the SEC declined to produce the requested documents.[1] On June 7, 1971, the SEC moved for summary judgment on the ground that, as a matter of law, all of the records requested are exempt from disclosure as "investigatory files". The SEC, argued that the "investigatory files" exemption applies as a "blanket" exemption, whether or not the investigation has ended. The SEC also urged that some of the records requested were "spe-

[1] The SEC sent petitioners a list of the names and addresses of all of the witnesses who testified before the SEC and stated that these individuals had been apprised by the SEC that each could obtain a copy of the transcript of his SEC testimony.

cifically exempt from disclosure by statute", pursuant to 5 U. S. C. 552(b)(3), by virtue of 18 U. S. C. 1905, which makes it a criminal offense for government employees to disclose certain types of information obtained during investigations "unless authorized by law". It claimed further that some of the records requested were exempt from disclosure under 5 U. S. C. 552(b)(4), as privileged or confidential information and, under 5 U. S. C. 552(b)(5), as intra-agency memoranda not available by law to a party.

In a decision, dated October 20, 1971 (Appendix A), Hon. Morris E. Lasker denied the SEC's motion for summary judgment, stating that the "investigatory files" exemption, 5 U. S. C. 552(b)(7), does not apply in this case since the SEC has concluded its investigation and has not established that any further investigation will occur. The Court held that the "investigatory files" exemption is available only as long as the Government "is actually or reasonably likely to be involved in an investigation for law enforcement purposes". The Court also found that the records in question were not "specifically exempted from disclosure by statute", under 5 U. S. C. 552(b)(3), by reason of 18 U. S. C. 1905. It held in abeyance its decision as to which, if any, of the files in question are not subject to disclosure under 552(b)(4) or 552(b)(5).[2]

Therefore, the only issues before the Second Circuit were: (1) whether the "investigatory files" exemption 552(b)(7) permanently bars disclosure even after the investigation and enforcement proceedings have ended, and (2)

[2] The Court ordered an in camera inspection of the documents claimed to be included with these exemptions. The examination was referred to the Magistrates of the District to hear and report as to whether and to what extent any of the materials fall within the exemptions of §552(b)(4) or (5).

whether 18 U. S. C. §1905, by means of 552(b)(3), establishes an exemption from the Act. The issues of confidentiality, privilege, and internal memoranda were not before the Court. On May 4, 1972, a divided Court of Appeals for the Second Circuit, per Hays C. J., reversed the order of Judge Lasker and directed that summary judgment be entered for the SEC. A lengthy dissent was filed by Judge James L. Oakes. In his opinion, Judge Hays stated that the issue before the Court was whether the "investigatory files" exemption applies "after the investigation and the enforcement proceeding have terminated" and held that this "exemption from disclosure applies even after an investigation and an enforcement proceeding have been terminated" (Appendix B).

Reasons for Issuance of the Writ

The decision of the Court of Appeals for the Second Circuit is in direct conflict on a key question of law with the decisions of the Court of Appeals for the District of Columbia, in *Bristol Myers Co.* v. *FTC*, 424 F. 2d 935 (1970) Cert. denied, 400 U. S. 824 (1970) and the Court of Appeals for the Fourth Circuit in *Wellford* v. *Hardin*, 444 F. 2d 21, 23 (1971). As stated by Hon. James L. Oakes in his dissenting opinion in the Court below (Appendix B):

> ". . . other respectable courts have taken a view differing from that of the majority today. In *Bristol-Meyers Co.* v. *FTC*, 424 F. 2d 935 (D. C. Cir.), cert. denied, 400 U. S. 824 (1970), the District of Columbia Court of Appeals declared that the 'investigatory files' exemption is available to the agency only '(i)f further adjudicatory proceedings are imminent.' . . . Prevention of 'premature discovery by a defendant' is the purpose of the exemption accord-

ing to the Fourth Circuit. *Wellford* v. *Hardin*, 444 F. 2d 23 (4th Cir. 1974)."

The case of *Evans* v. *Department of Transportation*, 446 F. 2d 821 (C. A. 5, 1971), cert. denied, U. S. , 30 L. Ed. 2d 788 (1972), upon which the majority in the court below relies, is inapposite to the facts of this case. In *Evans* the records were furnished voluntarily by a party who, at the time they were furnished, expressly asked that they be kept confidential, and an agency official gave his assurance that the furnished records would be kept confidential. The court in *Evans*, in interpreting the "investigatory files" exemption, was concerned that "such letters" not be revealed. Undoubtedly, its interpretation would have been different if it were dealing with the instant situation where the records sought were produced to the agency pursuant to subpoena and there was no request for or assurance of confidentiality.

In opposing the Petition for Certiorari in *Evans*, the Solicitor General argued that the primary question involved was "whether the identity of an informant . . . was exempt from disclosure" under section 552(b)(3) of the Freedom of Information Act by virtue of Section 1104 of the Federal Aviation Act of 1958. In this case, the SEC has already revealed the identity of its informants. Certiorari is sought on the much broader issue, involving a direct conflict between the circuits, whether the "investigatory files" exemption of the Freedom of Information Act applies after the investigation and the enforcement proceeding have terminated.

This direct conflict is crucial in this instance, because the Act provides that suit under the Act may be brought where the complainant resides or where the agency records are situated. Since "any person" can bring suit and since

most agency records are located in the District of Columbia, a complainant will avoid bringing suits, under the Act, in the Second Circuit where the "investigatory files" exemption applies after the investigation and enforcement proceeding have ended.[3] Complainants will shop for the forum where they can expect the most favorable result. Such forum shopping can be prevented only if this Court resolves this dispute between the circuits.

The decision of the Second Circuit involves a question which is crucial to the survival of the Act as a viable means for obtaining disclosure of governmental processes. A majority of government records are obtained during the course of "investigations", and according to the decision of the Court of Appeals for the Second Circuit, such records will never be available to the public even though many years may have passed since the investigation terminated. Most governmental records will be foreclosed forever from public disclosure in spite of a clear Congressional intent to the contrary.

The Second Circuit opinion is contrary to the purpose of the Act and its mandate for broad disclosure of governmental records. It is clear from the language of the Act and its legislative history that the legislative plan of Congress was to create a liberal disclosure requirement, limited only by specific exemptions, which are to be narrowly construed.[4] The legislative history of the Act makes it clear that the predecessor statute to the Act was full of loopholes which had been used to deny access to government records, and that in enacting the Act, Congress intended to establish a general philosophy of full agency disclosure.[5]

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[3] Petitioners could have brought this suit in the District of Columbia, where the law of the Circuit is that the "investigatory files" exemption does not apply, where the investigation has ended.

[4] 5 U. S. C. 552(c); *Bristol Myers Company* v. *FTC, supra,* at 938.

[5] Senate Report No. 813, 89th Cong., 1st Sess. (1965) pp. 3 and 5.

The Act's legislative history also shows clearly that the "investigatory files" exemption was not intended to apply after the underlying investigation had terminated.[6] Therefore, not only is the decision of the Court of Appeals for the Second Circuit in conflict with decisions of other circuits, but it is also contrary to the Act's legislative history and general purpose.

The decision of the Court below that the "investigatory files" exemption applies after the investigation has terminated, is based upon the fear that disclosure would hinder "future law enforcement efforts by the agency" by revealing "the agency's investigatory techniques and procedures" and "the names of people who volunteered the information that had prompted the investigation" (Appendix B). As noted by Hon. James L. Oakes, in his dissenting opinion in the Court below such fears are groundless.

> "... the federal courts can amply safeguard investigatory agency procedures and informants by in camera examination of the files in doubtful cases. Thus the fear of exposure underlying the majority's view is largely groundless."

Here, the district court (Appendix A) adequately protected the agency's "investigatory techniques and procedures" by reserving decision as to the agency's claims of confidentiality and privilege, under subsections 552(b)(4) and (5), and by arranging for in camera inspection of all documents claimed to fall within these exemptions. Furthermore, the SEC has made public the names of the wit-

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[6] H. R. Rep. No. 1497, 89th Cong., 2nd Sess. (1966) at p. 11; Senate Report No. 813, 89th Cong. 1st Sess. (1965) at p. 9.

nesses who gave testimony to it, therefore, the government's informants' privilege does not apply in this case.[7]

In many instances, the Government has been ordered to or has consented to produce documents obtained in the course of investigations and governmental investigatory powers have not been adversely affected.[8] Even the SEC has made public the contents of its investigatory files. In the matter of *Leeds Shoes, Inc.*, SEC docket 2-26940, the SEC conducted a private investigation, and as a result of its investigation, referred the matter to the Department of Justice for criminal proceedings. This reference led to the indictment of the former president of the company. *U. S.* v. *Frank Garcia et al.* 69-77 Cr. T (Middle Dist. Fla.) While this criminal suit was still pending, plaintiffs in a shareholders suit based upon the facts uncovered by the SEC investigation, requested the transcripts and documents obtained during the SEC investigation. On March 2, 1971, during the pendency of the criminal suit, the SEC granted

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[7] *Roviaro* v. *United States*, 353 U. S. 53, 59-61 (1957); the persons who furnished documents to the SEC knew that such materials would be made public by the SEC in any litigation against Occidental and Hammer, which ensued from the investigation. Petitioners' use of such information will be consistent with the purposes for which the documents and testimony were obtained. The public and Occidental shareholders should not be deprived of access to such information because the SEC chose to settle its suit against Occidental and Hammer.

[8] *United States* v. *Gates*, 35 F. R. D. 524 (D. Colo., 1964); *Timken Roller Bearing Company* v. *United States*, 38 F. R. D. 57 (N. D. Ohio, 1964); *United States* v. *San Antonio Portland Cement Company*, 33 F. R. D. 513 (N. D. Tex., 1964); *Royal Exchange Assoc.* v. *McGrath*, 13 F. R. D. 150 (S. D. N. Y., 1952); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933 (D. C. Hawaii, 1947); *United States* v. *Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La., 1949); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 50 F. R. D. 37 (N. D. Ill., 1969); *Atlantic City Electric Company* v. *A. B. Chance Company*, 313 F. 2d 431 (C. A. 2, 1963); *Consolidated Edison Co. of N. Y.* v. *Allis Chalmers Mfg. Co.*, 217 F. Supp. 36 (S. D. N. Y., 1963); *U. S.* v. *Darling-Delaware, Inc.*, 1972 Trade Cases para 73,818; *U. S.* v. *Amer. Oil Co., et al.* 1972 Trade Cases para 73,894.

the plaintiff shareholders' request and made public the testimony and exhibits obtained during the Leeds' investigation.

Shortly, thereafter the SEC refused petitioners' request for the testimony and exhibits obtained during the Occidental investigation, even though the Occidental investigation and suit had terminated. The SEC should not be permitted to operate in such an arbitrary and discriminatory manner. It will not be detrimental to the SEC, if more than one year after the investigation has ended, it produces transcripts, exhibits and documents, not confidential or privileged, to the shareholders of the company investigated, the shareholders, whom the SEC sought to protect by its investigation.

Conclusion

There is a direct and irreconcilable conflict between the decision of the Court below and the decisions of other courts of appeals with respect to whether the "investigatory files" exemption of the Freedom of Information Act permanently bars disclosure even after the investigation and enforcement proceedings have terminated. This is of vital importance since most agency records are "investigatory", and the opinion of the Court below makes the Act meaningless. The fears expressed by the Court below are unwarranted. For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of United States District Court Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 Civ. 2369
MEMORANDUM

FRANK FRANKEL, AGNES EISENBERGER and SONYA BRODY,
Plaintiffs,

against

SECURITIES AND EXCHANGE COMMISSION, *et al.*,
Defendants.

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Opinion of United States District Court

LASKER, D. J.

This suit grows out of plaintiffs' efforts to secure documents and records in the possession of the Securities and Exchange Commission ("SEC") for use by plaintiffs in a pending civil action against Occidental Petroleum Corporation and its officers. The papers are in the custody of the SEC as a result of an investigation of Occidental made by it which has been settled by a consent decree enjoining violations of §10(b) of the Securities Exchange Act and Rule 10b-5 thereunder.[1]

Plaintiffs seek, under provisions of the Freedom of Information Act, 5 U. S. C. §552, to compel the SEC to disclose to them the information secured in the SEC investigation of Occidental.[2] The SEC opposes on the ground

[1] *Securities and Exchange Commission* v. *Occidental Petroleum Corp., et al.*, 71 Civ. 982 (S. D. N. Y., March 5, 1971).

[2] On March 22, 1971, plaintiff's counsel requested, by letter and on SEC form 86 (7-67), that the SEC furnish all "letters, telegrams, reports, studies, memoranda, notes, lists, tabulations, press releases, summaries, analyses and other writings, including drafts," constituting material which "supports, explains and/or discusses" all violations of 15 U. S. C. §77j(b) "during the period January 1, 1966 to March 4, 1971 referred to or alleged in the complaint filed by the Securities and Exchange Commission on March 4, 1971, in the United States District Court, Southern District of New York [Index Number 71 Civ. 982], against Occidental Petroleum Corporation and Armand Hammer," and to furnish all SEC staff discussions of "any facts which support the allegations in the SEC complaint."

Although plaintiffs' request for SEC records is broad, the SEC's objections to it clearly indicate that the SEC knows the records being sought. "[T]his is all that the identifiability requirement contemplates. The fact that to find the material would be a difficult or time-consuming task is of no importance in making this determination; an agency may make such charges for this work as permitted by the statute. *Wellford* v. *Hardin*, 315 F. Supp. 175, 177 (D. Md., 1970), aff'd (Docket No. 14,904, 4th Cir., May 25, 1971).

that the material is exempt from disclosure under three statutory exemptions discussed below.

Two motions are before the court: Plaintiffs move for an injunction under the Act compelling defendants to disclose.[3] Defendants move for summary judgment on the ground that under the seventh exemption of 5 U. S. C. §552(b) they are entitled to judgment as a matter of law. For the reasons set forth below, the motion for summary judgment is denied and decision on the motion for an injunction is deferred pending examination by a special master of the material in the SEC's files to determine whether or not any documents fall within the exemptions of §552(b)(4) or (5).

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[3] Plaintiffs brought their motion on by Order to Show Cause filed June 1, 1971, "pursuant to 28 U. S. C. 1361." Clause One of the Complaint recites: "This action is brought under Title 28 U. S. C. Section 1361, Title 5 U. S. C. Section 552, 17 C. F. R. 200.80, and the general equity powers of this court." 5 U. S. C. §552(a)(3) provides, inter alia, that this court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." This authority to grant injunctions is sufficient for the relief sought here. No duty arises under the Freedom of Information Act, when the agency involved has invoked an exemption clause under §552(b), until the district court has reviewed the request for information *de novo*. Similarly, it has been held that Congress, by explicitly limiting the scope for judicial discretion in providing for injunctive relief when records are "improperly withheld," intended to curb the general equity powers of the court cited in plaintiffs' complaint. As was stated in *Soucie* v. *David* (No. 24,573, D. C. Cir. April 13, 1971), "Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here." Accordingly, plaintiffs' motion is treated here as one for injunctive relief pursuant to 5 U. S. C. §552; so much of the application as relies upon 28 U. S. C. §1361 or general equity powers is superfluous.

SUMMARY JUDGMENT AND THE EXEMPTION UNDER §552(b)(7)

Section 552(a) requires government agencies to disclose upon request broad categories of information in their files. Section 552(b) lists nine exemptions from the obligation to disclose.

Section 552(b)(7) reads as follows:

> "This section does not apply to matters that are—
>
> ". . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

The SEC contends that this provision exempts investigatory files "as a class" (including the Occidental documents) from the requirements of the Freedom of Information Act. The Commission also urges that the "except" clause (within the exemption) must, in the light of its legislative history, be read narrowly to apply only to parties whom a given agency is investigating, and not an outside party such as the plaintiffs here. Defendants admit that if this court finds that §552(b)(7) does not provide the blanket exemption urged, then their motion for summary judgment must be denied.

Plaintiffs contend that neither the plain meaning of the exemption's language nor its legislative history supports the SEC position. Further, they argue that, since the investigation was terminated in a consent decree on March 5, 1971, and the SEC has failed to establish that any further investigation will occur, the Commission has not met the burden of demonstrating that exemption (7) is now applicable.

The courts have divided on the question whether §552(b)(7) provides a blanket exemption for all investigatory

files. *Cowles Communications* v. *Department of Justice*, Docket No. C-70-1599-SAW (N. D. Cal. D. C. April 26, 1971), held that investigatory files "need not be produced whether [enforcement] proceedings be contemplated or not." However, where, as here, the investigation by the agency has been completed, the exemption of §552(b)(7) has been held not to apply.[4] As the court remarked in *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, 939 (D. C. Cir. 1970), "the agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label 'investigatory' . . . the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the complaint are nevertheless discoverable."[5]

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[4] Even if we were to accept the holding of *Cowles Communications* v. *Department of Justice*, *supra* in text, defendants would not be entitled to summary judgment at this juncture since the file sought has not been submitted or offered to the court for review in connection with this motion. In *Cowles*, the court declared that, despite the blanket protection of §552(b)(7), "[t]here remains . . . the question of whether a given file is an investigatory file compiled for law enforcement purposes . . . the Government should not be allowed to file an affidavit stating that conclusion and by doing so foreclose any other determination of the fact." Furthermore, there would remain an issue of fact as to whether the government's investigation for law enforcement purposes has concluded or whether action by the Attorney General was likely or probable.

[5] The SEC's contention that if the "except" clause of §552(b)(7) applies at all, it must be limited to the actual party being investigated by the agency, is without merit. As was stated in *Wellford* v. *Hardin*, (4th Circuit), *supra* note 2,

> "We agree with the district court that the legislative history of this exemption reveals that its purpose was to prevent premature discovery by a defendant in an enforcement pro-

(footnote continued on next page)

As in *Cooney* v. *Sun Shipping & Drydock Co.*, 288 F. Supp. 708, 711 (E. D. Pa. 1968), the question is presented "whether files once classified 'investigatory files' may forever after retain that characterization so as to be immune from disclosure under the statute." Here the SEC's investigation has concluded. It is true that the possibility remains that under 15 U. S. C. §78u(e) the SEC could "transmit" the file to the Attorney General who "may, in his discretion, institute the necessary criminal proceedings." However, the SEC has expressed no intention of transmitting the file, nearly one-half year has passed since the consent decree was entered, and absent some affirmative act by the agency to maintain the file as a legitimate one "compiled for law enforcement purposes" the Commission has not demonstrated for purposes of summary judgment, that the files any longer enjoy exemption under §552(b)(7).

This construction of the "investigatory files" exemption finds support in the language of §552, which explicitly provides (§552(c)) that "[t]his section does not authorize

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(footnote continued from previous page)

ceeding. The reports of the House Government Operations Committee and the Senate Judiciary Committee define the purpose of the exemption as the protection of the government's case in court. [Here] . . . the request for records does not come from a party facing an enforcement proceeding to which the investigative material is germane."

The cause is specific and when viewed in the context of the right of "any person" under §552(a) to obtain information ought not be narrowly construed. Any person may obtain material from investigatory files to the extent that the rules of discovery would make them available. See Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 799-800 (1966); Attorney-General's Memorandum on the Public Information Section of the Administrative Procedure Act, at 38 (1967).

withholding of information or limit the availability of records to the public, except as specifically stated in this section." It protects adequately the government's interest in maintaining its files undisclosed for so long as it is actually or reasonably likely to be involved in an investigation for law enforcement purposes, and at the same time carries out the policy of the Act "to increase significantly the public availability of agency records." *LaMort* v. *Mansfield*, 438 F. 2d 448, 451 (2d Cir. 1971).

THE (b)(3), (4) AND (5) EXEMPTIONS

Having concluded that defendants cannot rely upon §552(b)(7), it remains to be determined whether or not any of the files sought are exempt under §552(b)(3), (4) or (5).

Section 552(b)(4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential"; section 552(b)(5) exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." As the record stands, it is impossible to determine whether and to what extent the files contain material covered by either the exemptions of (b)(4) or (5). Certainly it is reasonable to assume, however, that the files contain some information which may fall within the various categories enumerated in (b)(4), and the provisions of ((b)(5) may apply to some extent as well. Such a determination must be made *in camera* in the first instance.

Section 552(a)(3) of the Act requires the court to expedite the determination of such questions. Since the files sought here are voluminous, containing 25 individual transcripts numbering 2100 pages and some 5000 pages of other documents,[6] and since important criminal cases

[6] See Affidavit of John G. Carleton, sworn to June 7, 1971.

are on the court's docket which must be disposed of forthwith, the matter will be referred, pursuant to 28 U. S. C. §636 and General Rule 35 of this Court, to the Magistrates of the Southern District of New York, to hold a hearing sitting as special master, at the earliest practicable date, for review of the material in the Commission's files and to report to this court as to whether and to what extent any of the material contained in such files falls within the exemptions of §552(b)(4) and (5).

There remains for discussion the Commission's claim that the "(b)(3)" exemptions applies. That clause provides that disclosure need not be made as to materials "specifically exempted from disclosure by statute." The Commission claims that, since 18 U. S. C. §1905 provides inter alia that an officer of the United States is liable criminally if he discloses investigatory material where "not authorized by law," the material here sought is exempt under §552(b)(3).

But this circular reasoning adds nothing to the defendants' armory. 18 U. S. C. §1905 does not establish an exemption from the Freedom of Information Act, but merely penalizes a disclosure of non-exempt material. We must still determine whether the material here sought is or is not exempt.

CONCLUSION

Defendants' motion for summary judgment is denied. A decision on plaintiffs' motion for an injunction is deferred pending the receipt of the report of the special master and the court's action thereon.

Submit order, including provisions for reference to the special master.

Dated: New York, New York
October 20, 1971

MORRIS E. LASKER
U. S. D. J.

APPENDIX B

Opinions of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 533—September Term, 1971.

(Argued February 2, 1972 Decided May 4, 1972.)

Docket No. 71-2213

FRANK FRANKEL, AGNES EISENBERGER, and SONYA BRODY,

Appellees,

v.

SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. CASEY, HUGH F. OWENS, A. SYDNEY HERLONG, JR., RICHARD B. SMITH, and JAMES J. NEEDHAM,

Appellants.

Before:

HAYS and OAKES, *Circuit Judges,* and
CLARIE, *District Judge of the District of Connecticut, sitting by designation.*

ROBERT N. KAPLAN, New York, New York (Dermot G. Foley, Kaplan, Kilsheimer & Foley, New York, New York, on the brief), *for Appellees.*

RICHARD E. NATHAN (G. Bradford Cook, David Ferber, Michael A. Macchiaroli on the brief), *for Appellants.*

HAYS, *Circuit Judge:*

The Securities and Exchange Commission appeals from an order of the United States District Court for the Southern District of New York enjoining the Commission from withholding certain documents that the appellees, relying on the Freedom of Information Act, 5 U. S. C. §552 (1970), sought to inspect and to copy. The district court held that the documents, which the Commission had compiled in an investigation and used in civil litigation against persons who are not parties to this action, were not exempt from disclosure under the Freedom of Information Act, 5 U. S. C. §552(b)(7) (1970) as "investigatory files," because the Commission apparently did not intend to commence further law enforcement proceedings in which the documents would be used. We reverse.

I. The Facts

In November, 1970, the Commission began a nonpublic investigation of Occidental Petroleum Corporation and some of its officers and directors. The Commission sought to determine whether certain statements of, and omissions to state, facts relating to various real estate transactions, in documents filed with the Commission and in press releases, violated §10(b) of the Securities Exchange Act of 1934, 15 U. S. C. §78j(b) (1970) and Rule 10b-5, 17 C. F. R. 240. 10b-5 (1972). During the course of this investigation the Commission heard testimony from at least 23 witnesses and obtained numerous documents from Occidental, individuals connected with that corporation, and third persons. The Commission amassed an investigatory file totaling over 7000 pages of testimony and documents relating to the affairs of Occidental and individuals connected with it, corporations with which Occidental dealt,

and third persons. On the basis of information obtained during the investigation, the Commission commenced a civil action against Occidental and its president, Armand Hammer, on March 4, 1971 in the United States District Court for the Southern District of New York. The complaint alleged that Occidental and Hammer violated §10(b) and Rule 10b-5; the Commission sought injunctive relief against further violations of the statute and the Rule. On March 5, the Commission and the defendants agreed upon a consent decree, and both the investigation and the suit were terminated when the court entered judgment on the basis of the consent decree.

Appellees in this action are shareholders of Occidental. They commenced a class action for damages against Occidental and Hammer, alleging various violations of the securities laws. The source of the facts alleged in their complaint was apparently the complaint filed by the Commission in its suit against Occidental and Hammer.

On March 22, 1971, appellees' attorney wrote the Commission "seeking documentary support for" the allegations of their complaint, and requested that appellees be permitted to inspect and to copy:

> "[a]s to each and every violation of Section 10b . . . and/or of Rule 10(b)-5 . . . , which occurred during the period January 1, 1966 to March 4, 1971 referred to or alleged in the complaint filed by the [Commission in its suit against Occidental and Hammer] . . . each and every document [defined as including "all letters, telegrams, reports, studies, memoranda, notes, lists, tabulations, press releases, summaries, analyses and other writings, including drafts"] which supports, explains and/or discusses such claimed violations.

> "... [E]ach and every document written by or to any employee of the Securities and Exchange Commission discussing any facts which supports [sic] the allegations in the SEC complaint. ..."

The Commission notified appellees' attorneys that the request was being considered by the Commission's staff. On April 22, the appellees' attorneys renewed the request for the documents. On May 27, having received no ruling on their requests, the appellees commenced this action seeking injunctive relief against continued withholding of the documents. The appellees alleged that the Commission was withholding the documents in violation of the provisions of the Freedom of Information Act. The Commission's answer set forth various affirmative defenses, including the defenses that the documents were not subject to the mandatory public disclosure requirements of the Freedom of Information Act by virtue of the "investigatory files" exemption, 5 U. S. C. §552(b)(7) (1970), the "trade secrets" exemption, 5 U. S. C. §552(b)(4) (1970), the "inter-agency or intra-agency memorandums" exemption, 5 U. S. C. §552(b)(5) (1970), and the exemption for documents "specifically exempted from disclosure by statute," 5 U. S. C. §552(b)(3) (1970). The Commission moved for summary judgment.

II. The District Court Ruling

The district court denied the Commission's motion for summary judgment and granted in part appellee's motion for an injunction against continued withholding of the documents. The district court ruled that the "investigatory files" provision of the Freedom of Information Act exempts an agency from the disclosure requirements of the Act only

"for so long as it [the agency] is actually or reasonably likely to be involved in an investigation for law enforcement purposes. . . ." The court took the position that, since the original investigation of Occidental and Hammer had been concluded on the date of the entry of the consent judgment, and since the Commission has taken no affirmative action "to maintain the file as a legitimate one 'compiled for [current] law enforcement purposes,'" the exemption from disclosure provided by §552(b)(7) no longer applied to the documents requested by the appellees. The court further held that "18 U.S.C. §1905 [the Trade Secrets Act] does not establish an exemption from the Freedom of Information Act [under §552(b)(3)], but merely penalizes a disclosure of non-exempt material." The court deferred decision on appellees' motion for an injunction pending receipt of the report of a special master appointed by the court to review the voluminous file and to report whether or not any of the requested documents fell within the coverage of §552(b)(4), which exempts an agency from having to disclose "trade secrets and commercial and financial information obtained from a person and privileged or confidential," and §552(b)(5) which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The court granted appellees' motion for an injunction requiring the Commission to allow the appellees to inspect and to copy all the records that the Commission did not claim to be exempt under §552(b)(4) or (b)(5).

III.

The question presented by this appeal is whether the exemption from disclosure to "any person" of "matter" contained in an "investigatory file" compiled and utilized by an agency in an enforcement proceeding applies after the

investigation and the enforcement proceeding have terminated. The Commission's investigation of Occidental and Hammer and its enforcement proceeding were successfully concluded on March 5, 1971; the appellees first requested copies of the documents contained in the investigatory file on March 22. The Commission has not commenced any further enforcement proceedings based on information obtained during the investigation. On the other hand the Commission has not affirmatively decided that no further action will be taken against individuals or corporations connected with the transactions and occurrences which were investigated.

The relevant sections of the Freedom of Information Act,[1] 5 U. S. C. §552 (1970), provide:

> (b) This section [of the Administrative Procedure Act requiring agencies to make information available to the public] does not apply to matters that are—
>
> . . .
>
> (3) specifically exempted from disclosure by statute;
>
> . . .
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; . . ."

The statute on its face does not limit the "investigatory files" exemption to files that the agency is currently using or is planning to use in a law enforcement proceeding. To

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[1] The discrepancies between the enacted version of the Freedom of Information Act, Pub. L. 89-487, 80 Stat. 250, and the codified version are the result of changes made during codification to conform the enacted version with the style of Title 5 of the United States Code. These changes were not intended to alter in any way the substance of the law as originally enacted. See 1967 U. S. C. Cong. & Admin. N. 1196.

assist us in determining whether the statutory exemption for "investigatory files" applies after enforcement proceedings have been terminated, we turn to the legislative history of the Act.

A. The Freedom of Information Act

The Freedom of Information Act marked the culmination of over ten years of congressional study of the practices and procedures of the executive branch in the administration of national law. The Senate Report on the Act [2] stated that the prior provisions of the Administrative Procedure Act were "full of loopholes" that often enabled federal administrative agencies improperly to withhold from the public information relating to the operations of government. Federal agencies also sometimes utilized the doctrine of "executive privilege" [3] to bar disclosure of information bearing upon the governmental process.

The broad legislative intent behind the enactment of the Freedom of Information Act, as disclosed by the Report of the Senate Committee on the Judiciary [4] and the Report of the House Committee on Government Operations,[5] was

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[2] S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), hereinafter cited as Senate Report.

[3] See *United States* v. *Reynolds*, 345 U. S. 1 (1953); Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 763-65 (1967).

[4] Senate Report at 2-3.

[5] H. R. Report No. 1497, 89th Cong., 2d Sess. (1966), hereinafter cited as House Report. Some courts and commenatators have suggested that the Senate Report better indicates the legislative intent of Congress as a whole because the House Report was not printed until after the Senate had passed the bill and sent it to the House. See *Getman* v. *N.L.R.B.*, 450 F. 2d 670, 673 n. 8 (D. C. Cir. 1971). See also *Davis, supra*, at 762-63. Whatever merit this suggestion may have with respect to isolated sentences dealing with specific provisions of the Act, the same broad purpose behind the Act as a whole and its major provisions is reflected in both reports.

to give the electorate greater access to information concerning the operations of the federal government. The ultimate purpose was to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities.[6] The Senate Report said of the bill:

> ". . . [i]t eliminates the test of who shall have the right to different information. For the great majority of different records, the public as a whole has a right to know *what its Government is doing.* There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside these limited areas, all citizens have a right to know."

Id. at 5-6 (emphasis added). The House Report, after citing several examples of agencies withholding information relating to their operations, House Report at 5-6, states:

> "It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests."

Id. at 6. In conclusion, the House Report observed:

> "In the time it takes for one generation to grow up and prepare to join the councils of Government—

[6] Senate Report at 2-3, 10; House Report at 2, 3, 5-6, 12.

> from 1946 to 1966—the law which was designed to provide public information about Government activities has become the Government's major shield of secrecy.
>
> S. 1160 will correct this situation. It provides the necessary machinery to assure the availability of Government information necessary to an informed electorate."

Id. at 12.

The legislative history, and, indeed, the various disclosure provisions of the Act itself clearly indicate that the general purpose of the Act was that the public be informed about the processes of government so that the electorate would be in better position to pass upon the structure and operation of government.

B. The "Investigatory Files" Exemption

The Senate and House Reports also reveal the general legislative purpose for exempting from disclosure matter contained in investigatory files compiled for law enforcement purposes.

The Senate Report states:

> "Exemption No. 7 deals with 'investigatory files compiled for law enforcement purposes.' These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court."

Senate Report at 9. An earlier portion of the same report, discussing the general purpose of the Act, said of the need for balancing the interests of disclosure and confidentiality:

> "It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation."

Senate Report at 3.

The House Report, in discussing the "investigatory files" exemption, states:

> "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

House Report at 11.

These Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement.

The conclusion that the §552(b)(7) exemption from disclosure applies even after an investigation and an enforcement proceedings have been terminated is supported both by the authority of the cases decided under the Act and by consideration of the policies underlying the Act in general

and the investigatory files exemption in particular. In *Evans* v. *Department of Transportation,* 446 F. 2d 821, 824 (5th Cir.), petition for cert. filed, 40 U. S. L. W. 3625 (U. S. Nov. 24, 1971) (No. 71-698), the court said:

> "We are of the further opinion that Congress could not possibly have intended that such [matter] should be disclosed once an investigation is completed. If this were so, and disclosure were made, it would soon become common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the [agency] of something which might justify investigation."

See also *NLRB* v. *Clement Bros. Co.,* 407 F. 2d 1027 (5th Cir. 1969).

If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. The agency's investigatory techniques and procedures would be revealed. The names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed. The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement of the law since these agencies rely, to a large extent, on voluntary cooperation and on information from informants.

In the present case disclosure would have but small effect with respect to the general purposes of the Act, the better informing of the electorate as to the operations of government. On the contrary it would defeat important purposes of the exemption for investigatory files. We therefore reverse.

Of course our decision does not mean that appellees are completely barred from obtaining information contained in the requested documents. In their suit against Occidental and Hammer appellees are entitled to the usual remedy of discovery under the discovery provisions of the Federal Rules of Civil Procedure. In the discovery procedure a district judge will be able to balance the need for the documents with the need for confidentiality.

The order of the district court is reversed, and remanded with directions to enter summary judgment for appellants.

OAKES, *Circuit Judge* (dissenting):

Legislative history can often be a helpful device for judges in the dark seeking light, as we are here.[1] But the legislative history of the Freedom of Information Act is so extensive and so full of internal inconsistencies that Professor Davis has said of it:

> Even though the records of the various hearings over a ten year period are voluminous, probably more than ninety-five per cent of the useful legislative history is found in a ten page Senate Committee report and in a fourteen page House Committee report. . . . Committee reports not addressed to the enacted version of the bill do not show the intent of Congress in enacting the statute. They show what the intent of Congress would have been if it had enacted the bill it did not enact.

Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 762, 791 (1967). Unfortunately, nothing

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[1] Perhaps legislative history should be utilized only when it is subordinated, like the words of the act, to the "principal task of deriving the specific intent of Congress from a full and sympathetic understanding of its purpose." Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 381-82 (1947).

in the two reports Professor Davis mentions sheds any light on the specific question before us.[2] That question is whether, once an investigation has been terminated, and utilization of the files for law enforcement purposes is not reasonably likely, "investigatory files compiled for law enforcement purposes" [5 U. S. C. §552(b)(7)] are exempt from the disclosure requirements of 5 U. S. C. §552(a)(3). Indeed, our question is narrower still, for a careful district judge specifically framed his order and accompanying memorandum to preserve to the SEC, through in camera production, its exemptions under 5 U. S. C. §552(b)(4), "commercial or financial information obtained from a person and privileged or confidential," and (b)(5), "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[3]

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[2] An early Senate report does indicate that the Act "is not a withholding statute but a disclosure statute. . . ." Senate Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).

[3] *Frankel* v. *SEC*, Civil Docket No. 71-2369 (S. D. N. Y., Oct. 20, 1971 [mem.]; Nov. 5, 1971 [order]). By thus narrowing his decree, Judge Lasker takes away the force of the majority's argument that future law enforcement efforts could be hindered by revealing the agency's investigatory techniques and procedures or the names of informants. It seems to me that under subsections (b)(4) and (b)(5) adequate protection of these legitimate agency objectives is assured. Moreover, while the government may have a privilege not to disclose the *identity* of informers, *Roviaro* v. *United States*, 353 U. S. 53, 59-61 (1957), *here the SEC has already disclosed the names of the witnesses who gave testimony to it.* The SEC concedes that the subsection (b)(4) and (b)(5) exemptions would cover much of the material in their investigative files but worries lest *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 425 F. 2d 578 (D. C. Cir. 1970), will cause it some work by its requirement of "suitable deletions" by the agency from each document to make the protection of the exemption available. 425 F. 2d at 581. *See also Getman* v. *NLRB*, 450 F. 2d 670, 673 (D. C. Cir. 1971); *Soucie* v. *David*, 448 F. 2d 1067, 1078 (D. C. Cir. 1971). This is a typical agency argument and it really doesn't rise to a level warranting judicial reply.

On the narrow question before us reasonable judges may readily differ. I dissent from the views of my brethren because I think the Act contains an underlying recognition that disclosure of the workings of a government bureaucracy, which long since has suffered the "curse of bigness," can benefit the agency by increasing its sense of responsibility to the public. The Freedom of Information Act has as its aim, in other words, a delegation by Congress to the federal courts of the power to subject agency operations to public perusal. Behind this policy are some of the same considerations which underpin freedom of the press; at the very least the Act was intended to expand the possibility of "participation in decision making by all members of society." T. Emerson, The System of Freedom of Expression 7 (1970).

It is, therefore, not surprising that other respectable courts have taken a view differing from that of the majority today and of the Fifth Circuit in *Evans* v. *Department of Transportation*, 446 F. 2d 821 (5th Cir. 1971), *cert. denied*, 40 U. S. L. W. 3399 (U. S. Feb. 22, 1972), upon which the majority relies.[4] In *Bristol-Meyers Co.* v. *FTC*, 424 F. 2d 935 (D. C. Cir.), *cert. denied*, 400 U. S. 824 (1970), the District of Columbia Court of Appeals declared that the "investigatory files" exemption is available to the agency only "[i]f further adjudicatory proceedings are imminent." 429 F. 2d at 939. Prevention of "premature discovery by a defendant" is the purpose of the exemption according to the Fourth Circuit. *Wellford* v. *Hardin*, 444 F. 2d 21, 23 (4th Cir. 1971). Judge Higginbotham has put it that the purpose is "to avoid a *premature* disclosure of an agency's case when engaged in law enforcement activi-

[4] Our own case, *LaMorte* v. *Mansfield*, 438 F. 2d 448, 451 (2d Cir. 1971), doesn't go to the specific question here.

ties." *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 711-12 (E. D. Pa. 1968) (emphasis original). He looks at the exemptions, quite practically, as a codification of existing judicially and congressionally created exceptions. *Id.* at 712.[5]

An analysis of the prior case law discloses a number of times when government agencies have been required, on a showing of good cause, to produce documentary material

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[5] The commentaries in point shed no more light than the legislative history. One, less a carefully reasoned legal analysis that it is a polemic, as its name implies, is Katz, *The Games Bureaucrats Play: Hide and Seek under the Freedom of Information Act*, 58 Texas L. Rev. 1261 (1970). Ms. Katz does make the point that the exceptions—including the "investigatory files" exception—are "administrative loopholes through which federal officials escape with records intact." *Id.* at 1262, and see 1277-84. She goes on to say that "[o]nce litigation is concluded, disclosure is impliedly required." *Id.* at 1279. And she adds:

> Admittedly it may sometimes be difficult for the agency itself to know whether an enforcement action will be brought in the near future. As long as there is a realistic prospect that such an action will be instituted, and as long as administrators endeavor to make the enforcement decision as quickly as possible, the exemption should apply. But the exemption should not avail an agency that claims only that its investigatory files are "open" and therefore always subject to use in hypothetical future enforcement proceedings.

Id. at 1280 n. 100.

Another Naderite, Peter H. Schuck, Esq., has recently told a congressional committee that the Act "has foundered on the rocks of bureaucratic self-interest and secrecy." N. Y. Times, Mar. 15, 1972, at 19, col. 1 (city ed.). I would suggest that it has foundered on the rocks of equivocal draftsmanship. One of its pertinent critical failings has been pinpointed by Professor Davis:

> The Act is faulty in its use of the unsatisfactory term "files." Much of the contents of investigatory files compiled for purposes that may include law enforcement should not be exempt from required disclosure.

Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 800 (1967).

obtained in the course of an investigation. Disclosure of grand jury minutes, for example, has been ordered in private antitrust cases involving electric companies. *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (2d Cir. 1963) (*per curiam*) (minutes turned over to antitrust plaintiff); *accord, Consolidated Edison Co.* v. *Allis-Chalmers Manufacturing Co.*, 217 F. Supp. 36 (S. D. N. Y. 1963). *See also Illinois* v. *Harper & Row Publishers, Inc.*, 50 F. R. D. 37 (N. D. Ill. 1969) (children's books antitrust suit). Documents possessed by the Internal Revenue Service that bear directly upon disputed tax calculations have also been disclosed by court order. *Timken Roller Bearing Co.* v. *United States*, 38 F. R. D. 57 (N. D. Ohio 1964); *accord, United States* v. *Gates*, 35 F. R. D. 524 (D. Colo. 1964); *United States* v. *San Antonio Portland Cement Co.*, 33 F. R. D. 513 (W. D. Tex. 1963). The United States Justice Department itself has been the subject of disclosure orders. *Royal Exchange Assurance* v. *McGrath*, 13 F. R. D. 150 (S. D. N. Y. 1952) (Attorney General ordered to produce for trustee investigative reports regarding conduct and control of foreign corporation); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933 (D. Hawaii 1947) (FBI ordered to produce investigative reports pertaining to plaintiff's alleged wrongful imprisonment).

I am of the view that the federal courts can amply safeguard investigatory agency procedures and informants by in camera examination of the files in doubtful cases. Thus the fear of exposure underlying the majority's view is largely groundless. The argument to which the SEC is ultimately reduced is that it should not be required to disclose its files to just "any person." The fact is that plaintiffs here are or were in litigation with Occidental Petroleum. Thus, if the words "any person" mean any person with standing, plaintiffs here surely have it.

I would affirm the opinion and judgment below.

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MICHAEL RODAK, JR.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

FRANK FRANKEL, AGNES EISENBERGER and SONYA BRODY,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION et al.,

Respondents.

Docket No. 72-49

BRIEF OF AMICUS CURIAE CENTER FOR STUDY OF RESPONSIVE LAW IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

Frank Frankel, Agnes Eisenberger and Sonya Brody,

Petitioners,

v.

Securities and Exchange Commission et al.,

Respondents.

I. INTEREST OF AMICUS CURIAE

The Center for Study of Responsive Law [the "Center"] is a non-profit organization exempt from Federal taxation under § 501(c)(3) of the Internal Revenue Code. One of the purposes of the Center is to study the operations of Government agencies. In connection with its work, the Center frequently has occasion to request documents from Federal agencies under the provisions of the Freedom of Information Act, 5 U.S.C. § 552. Since many of these documents have been claimed

to be investigatory files within the meaning of the seventh exemption in the Act, 5 U.S.C. § 552(b)(7), the decision of the Court of Appeals for the Second Circuit in this case, which gives an expansive reading to that exemption, threatens to interfere substantially with the Center's ability to obtain the information necessary to carry out its functions. In addition, the Center has a special project in which an attorney is engaged on a full-time basis solely with litigation and other matters relating to the Freedom of Information Act. Therefore, the development of the law in this area in general, and as it relates to the investigatory files exemption in particular, is of special interest to the Center.

II. REASONS FOR ISSUANCE OF THE WRIT

A. Conflict Between Circuits

In reversing the decision of the District Court, the Court of Appeals for the Second Circuit held that even after an investigation and subsequent enforce-

ment proceeding are concluded, and although no further enforcement proceeding is contemplated, an agency's investigatory files are exempt from the requirement of disclosure under 5 U.S.C. § 552(b)(7). This decision is in direct conflict with that of the Court of Appeals for the District of Columbia, which said in Bristol-Myers Co. v. FTC, 424 F.2d 935, 939, cert. denied, 400 U.S. 824 (1970):

> If further adjudicatory proceedings are imminent, then the company's request may fall within the category the exemption was designed to control.... But the agency cannot, consistent with the broad mandate of the Act, protect all its files with the label "investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date.

Continuing, the Court held:

> Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable. Id. at 939-40.

As a result, a plaintiff in the Second

Circuit will be denied access to the very same closed investigatory files that another plaintiff can obtain in the District of Columbia. This Court should grant the writ to resolve that conflict.

While the facts of these two cases differ to some degree, we submit that there is no meaningful distinction that might serve to harmonize them. In Bristol-Myers the Federal Trade Commission had initiated a proceeding against a company but later withdrew the complaint before the request for documents was made. In this case the Securities and Exchange Commission had terminated its investigation and its suit had been resolved by way of a consent decree with defendants which was entered as a judgment in the United States District Court for the Southern District of New York. In both cases the agency involved had completed its investigation and had terminated the only law enforcement proceeding which it contemplated bringing. Although the time period between the withdrawal of the complaint and the request for documents in

Bristol-Myers (over 2 years) was greater than that between the consent decree and the request for documents in this case (17 days), the issue was identical--whether investigatory files continue to qualify for a section 552(b)(7) exemption where there is no "imminent" or "concrete" prospect of future enforcement proceedings. Indeed, if there is any meaningful difference between the two cases, the argument for disclosure is greater here, since in Bristol-Myers the complaint was merely withdrawn, thus leaving open the possibility of further adjudication, whereas in this case, a consent decree binding on all parties has become a judgment of the Court.

The decision of the Court of Appeals for the Second Circuit conflicts not only with the explicit holding of Bristol-Myers, but also with the spirit of Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971). In that case, the material sought was already in the hands of the parties against whom any law enforcement proceeding might be brought. The Fourth Circuit held that, since the purpose of the investigatory

files exemption is to protect the Government's case in court by preventing premature discovery by a defendant in an enforcement proceeding, plaintiff was entitled to the documents because disclosure to the potential defendants had already taken place. The Court went on to note:

> By its terms, the seventh exemption applies only to investigatory files compiled for law enforcement purposes. The emphasis of the statute is upon the investigatory character of the files and under § 552(c), the exemption should be limited "specifically" to files of this type. It should not be enlarged, we hold, to include records of administrative action taken to enforce the law. Id. at 25.

The result reached below has produced an anomolous situation with regard to a plaintiff's ability to obtain the documents sought here. In LaMorte v. Mansfield, 438 F.2d 448 (2d Cir. 1971), the Court held that once a witness has been allowed to obtain the transcript of his testimony in a non-public investigation conducted by an agency, the transcript loses its confidential status and may be

obtained through discovery by plaintiffs and co-defendants in a suit involving that witness. Thus, in this situation if Occidental Petroleum Company, the company involved in the related civil action for which these documents are sought, had previously requested a transcript of the testimony given by its employees before the SEC,* plaintiffs in this case could easily have obtained it directly from Occidental. Yet, the Court of Appeals held that the SEC was not required to make them available to petitioner. The clear result of this decision, therefore, will be to discourage witnesses from obtaining copies of their testimony in order to avoid the risk of later having to disclose it to an adverse party in a lawsuit.

B. Importance of Issue

The issue presented in this case is of major importance to the operation of

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* The SEC has apprised all witnesses that each could obtain a copy of the transcript of his testimony. Presumably, this was done pursuant to the requirement set forth in 17 C.F.R. § 203.6.

the Freedom of Information Act. During the four years since the Act went into effect, agencies of the Federal Government relied on the investigatory files exemption at least 244 times in refusing access to documents. See Freedom of Information Act Analytic Chart, Hearings Before Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d Sess. 1338-42 (March 1972). In many of the cases that eventually reached the courts, the investigatory files exemption was one of the issues litigated. See e.g., Getman v. NLRB, 450 F.2d 670 (D.C. Cir.), stay denied, 404 U.S. 1204 (1971); Evans v. Department of Transportation, 446 F.2d 821 (8th Cir. 1971), cert. denied, 405 U.S. 918 (1972); Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); M.A. Schapiro & Co., Inc. v. SEC, 339 F. Supp. 467 (D.D.C. 1972); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971); Wecksler v. Shultz, 324 F. Supp. 1084 (D.D.C. 1971); Cooney v. Sun Shipbuilding & Drydock Co., 288

F. Supp. 708 (E.D. Pa. 1968). The Supreme Court has never ruled on the meaning of the investigatory files exemption, and review in this case would significantly aid in clarifying this area of the law.

Supreme Court review is especially critical in this case because the decision of the Second Circuit creates a glaring loophole in the operation of the Freedom of Information Act that threatens to interfere with its basic purpose of providing the public with greater access to information held by the Federal Government.* S. Rep. No. 813, 89th Cong., 1st Sess. 5-6 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966). In order

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* The Second Circuit too narrowly limited the group of persons entitled to the benefits of the Act when it said that "[i]n the present case disclosure would have but a small effect with respect to the general purpose of the Act, the better informing of the electorate as to the operations of the government" [emphasis added]. As the House and Senate Reports, quoted in the opinion, make clear, the purpose is to protect the right of any individual to find out how the Government is operating. The Court has seriously misconceived its function if, as the above quotation suggests, it

to reconcile this purpose with the effective operation of government agencies, the Act created an exemption for investigatory files, the basic goal of which was to prevent premature disclosure of an agency's case when engaged in law enforcement activities. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). See also Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 712 (E.D. Pa. 1968). However, if an investigatory file prepared for law enforcement purposes is foreover exempt from the requirement of disclosure, agencies will be able to avoid granting requests for any documents

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has taken upon itself to determine whether the information sought will be of general interest to the electorate. Any information, not subject to a specific exemption, must be disclosed, Soucie v. David, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971), no matter how trivial it may seem and whatever the purpose for which it is sought. The fact that any citizen wishes to have access is conclusive evidence that disclosure would serve the function of informing the public.

that bear upon its regulatory function even though their disclosure would not harm the agency's case in any current or foreseeable enforcement proceeding. Such a broadened scope for the investigatory files exemption increases the likelihood that agencies will seek to utilize it in order to evade the general disclosure requirement of the Act. See generally, Joan M. Katz, The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act, 48 TEXAS L. REV. 1261 (1970).

This prospect is neither remote nor speculative. Nearly every government agency performs some law enforcement functions, and many important documents are the product of research and investigations that might be claimed to bear some relation, however indirect, to law enforcement. Thus, there is a strong temptation for any government agency that wishes to avoid disclosure to invoke the investigatory files exemption as a matter of course. In some cases the claim of investigatory files exemption has bordered on the frivolous. For example, in Getman v. NLRB, 450 F.2d 670 (D.C. Cir.), stay denied, 404 U.S. 1204 (1971), the Board claimed that an Excelsior list--

containing the names and addresses of the employees of a plant entitled to vote in an election under the NLRA-- was an investigatory file. While such claims will ultimately be defeated in the courts, they prevent the fulfillment of the provision in the Freedom of Information Act that "each agency ... shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3) [emphasis added]. Thus, if the Act is to become largely self-executing, and if its primary purpose is to be met, a greater limitation on the scope of the investigatory files exemption is required.

In our experience we have encountered an almost reflex claim of "investigatory files" to our requests for various research reports. The decision below threatens to aggravate that problem, thereby making it more difficult to learn what the Government is doing, at least without taking every request to court. For example, the Department of Agriculture recently denied a request for audit reports compiled by Inspector General which survey the compliance of programs receiving Federal

assistance with Title VI of the Civil Rights Act of 1964. The Department of Agriculture refuses to disclose the documents on the ground that under the decision of the Court of Appeals for the Second Circuit they were investigatory files subject to exemption even though no enforcement proceeding has been commenced or planned since the completion of the audit. If a refusal to disclose such reports is justified in these circumstances, then it is difficult to see how a citizen can obtain the results of the research of any agency, thereby interfering with efforts to determine whether a particular agency is in fact carrying out its law enforcement duties. Under the decision of the Second Circuit, an agency could sit on its investigatory files indefinitely without enforcing the law, and private citizens would remain powerless to challenge such inaction since they would lack the evidence that would demonstrate the agency's neglect.

Recognizing this problem, the District Court in Wecksler v. Shultz, 324 F. Supp. 1084 (D.D.C. 1971) held that docu-

ments prepared under the supervision of the Secretary of Labor in connection with inspections of plants subject to the Walsh-Healy Public Contracts Act, were subject to disclosure under the Freedom of Information Act. Similarly, in M.A. Schapiro & Co., Inc. v. SEC, 339 F. Supp. 467 (D.D.C. 1972), the District Court ordered the disclosure of the SEC's Staff Study on the off-board trading problem raised by the New York Stock Exchange's original Rule 394, plus all transcripts made and documents received by the SEC in the course of that investigation. The Court held that, although these documents were arguably "investigatory files compiled for law enforcement purposes, the agency failed to proffer any facts that would show it contemplated commencing a law enforcement proceeding bases upon that investigation within the reasonably near future.

The Court of Appeals for the Second Circuit seems to have tacitly recognized that the request for disclosure of investigatory files can not be denied where no law enforcement proceeding is contem-

plated on the ground that premature disclosure would injure the Government in some hypothetical future case. Instead of denying disclosure because of the likelihood of a law enforcement proceeding, the Court of Appeals relied on the argument that unlimited disclosure of investigatory files would hinder an agency's performance by revealing its investigatory techniques and procedures.

This argument is flawed in several respects. First, despite the Court's assertion to the contrary, there are no indications in either the House or Senate Reports that one of the Congressional purposes behind the investigatory files exemption was to keep confidential the procedures by which an agency conducts its investigations. Those Reports speak exclusively of the need to prevent premature disclosures in order to protect the Government's case in court. S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

Second, the Court's heavy reliance on Evans v. Department of Transportation,

446 F.2d 821 (8th Cir. 1971), cert. denied, 405 U.S. 918 (1972), is also misplaced. In Evans the Eighth Circuit refused to order the Department of Transportation to disclose the identity of an informant even though no further disciplinary proceedings were contemplated. The Court suggested that the investigative actions of an agency would be impaired if individuals could not report apparent violations to the Government in confidence. As an additional, and we suggest more appropriate basis for denying the request, the Court in Evans relied upon 49 U.S.C. § 1504, which prohibits disclosure of information given in confidence, which is made applicable to the Freedom of Information Act by 5 U.S.C. § 552(b)(3). Thus, at most, Evans created a narrow further exemption beyond the express purpose of the investigatory files exemption.

However, the decision below creates a situation in which any document, once placed in a file relating to a law enforcement investigation, is forever exempt from disclosure. The documents requested by petitioners are merely the transcripts

of testimony before the SEC and the exhibits related to that testimony. Since the SEC has already sent petitioners a list of the names of all the witnesses who testified before it, there is no question, as there was in Evans, of protecting the confidentiality of an informant. And even if one purpose of this exemption is to keep confidential the procedures by which an agency conducts its investigations, it is hard to see how the disclosure of the requested transcripts, consisting of questions and answers, would in any way interfere with the operations of the SEC, particularly since these procedures were made available to the very persons against whom the investigation was directed.

III. CONCLUSION

Because of the possibility that the investigatory files exemption may inhibit prompt public access to important documents to which it has a right, the Court in Bristol-Myers wisely limited its use to the situation where disclosure would create a real risk of interfering with

the agency's efforts in an actual or imminent law enforcement proceeding. The Supreme Court should grant the petition for a writ of certiorari here in order to resolve the conflict between the Courts of Appeals for the District of Columbia and the Second Circuit and to reverse the decision of the latter for its failure to carry out the purpose of the Freedom of Information Act.

Respectfully submitted,

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August 2, 1972

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* The assistance of Frederick P. Schaffer is gratefully acknowledged.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-49

FRANK FRANKEL, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported. The opinion of the district court (Pet. App. A) is reported at 336 F. Supp. 675.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1972. The petition for a writ of certiorari was filed on July 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the exemption from the disclosure requirements of the Freedom of Information Act for "investigatory files compiled for law enforcement purposes"

continues after the investigation has been completed and enforcement action is not imminent.

STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in part:

> (a) Each agency shall make available to the public information as follows:
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> * * * * *
>
> (3) * * * [E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *
>
> (b) This section does not apply to matters that are—
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> * * * * *
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency * * *.
>
> * * * * *

STATEMENT

In March 1971, the Securities and Exchange Commission brought an action against Occidental Petroleum Corporation and its president, Armand Hammer, and obtained an injunction by consent against future violations of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b–5 thereunder, 17 C.F.R. 240. 10b–5.[1] Thereafter, petitioners, shareholders of Occi-

[1] *Securities and Exchange Commission* v. *Occidental Petroleum Corp.*, S.D. N.Y., No. 71 Civ. 982 (March 5, 1971).

dental, initiated a class action for damages against Occidental and Hammer and formally requested the Commission to show them the investigatory file upon which the agency's action had been based (A. 34–42).[2] When the Commission declined to do so,[3] the petitioners instituted an action in the United States District Court for the Southern District of New York seeking to compel disclosure pursuant to the Freedom of Information Act, 5 U.S.C. 552. The Commission moved for summary judgment on the ground that the records requested were exempt from the disclosure requirements of the Act under the exemption covering "investigatory files compiled for law enforcement purposes * * *," 5 U.S.C. 552(b)(7).[4]

[2] "A." refers to the Appendix in the court of appeals, a copy of which has been lodged with this Court.

[3] The Commission made available to petitioners the names and addresses of persons who had given sworn testimony during the investigation. The record does not disclose whether petitioners have ever sought to obtain copies of the transcripts from them.

[4] The Commission's answer (A. 46–49) also set forth the defenses that information obtained in the investigation was protected against disclosure as "trade secrets and commercial or financial information obtained from a person and privileged or confidential," pursuant to 5 U.S.C. 552(b)(4), and that under 5 U.S.C. 552(b)(3) the records were "specifically exempted from disclosure by statute"—namely, the Trade Secrets Act, 18 U.S.C. 1905. The Commission further alleged that to the extent petitioners had requested "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," the records requested were exempt from disclosure pursuant to 5 U.S.C. 552(b)(5).

The district court denied the Commission's motion. It did not question that the requested investigatory file had been "compiled for law enforcement purposes," in the sense that law enforcement was the purpose for which the information contained in the files had been gathered; but, apparently because the Commission declined to reveal the status of its investigation,[5] the court assumed that the Commission's "investigation ha[d] concluded" (Pet. App. A 6). It held (*ibid.*, emphasis added):

> * * * absent some affirmative act by the agency to *maintain* the file as a legitimate one "compiled for law enforcement purposes" the Commission has not demonstrated * * * that the files *any longer* enjoy exemption under § 552(b)(7).

The district court therefore ordered disclosure of those records that the Commission did not claim to be exempt under other provisions (A. 67–69).[6]

The court of appeals reversed, with one judge dissenting. The court noted first that "[t]he statute on its face does not limit the 'investigatory files' exemption to files that the agency is currently using or is planning to use in a law enforcement proceeding"

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[5] Except in the context of an enforcement action, the results of an investigation are ordinarily not revealed. This is to avoid impairing prospective enforcement efforts and to assure the continued vitality of the Commission's information-gathering procedures.

[6] Decision on petitioner's motion for an order compelling disclosure of all of the investigatory file was deferred pending determination of whether specific contents were protected either under the "confidential" exemption, 5 U.S.C. 552(b)(4), or as "intra-agency memoranda," 5 U.S.C. 552(b)(5).

(Pet. App. B 6). Looking next to the legislative history of the exemption, the court found that its purpose was both to prevent premature disclosure of the agency's case and to preserve the confidentiality of its investigatory procedures (Pet. App. B 10). It therefore concluded that, while the disclosure requested by petitioners would to a limited extent advance the general purpose of the Act—*i.e.*, "the better informing of the electorate as to the operations of government"—it would at the same time "defeat important purposes of the exemption for investigatory files" (Pet. App. B 11).[7]

ARGUMENT

The decision of the court below was correct and there is no cause for further review by this Court.

1. Petitioners contend that "[t]he Act's legislative history * * * shows clearly that the 'investigatory files' exemption was not intended to apply after the underlying investigation had terminated" (Pet. 9). The dissenting judge below took the somewhat differ-

[7] The court stated (Pet. App. B 11):

"If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. The agency's investigatory techniques and procedures would be revealed. The names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed. The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement of the law since these agencies rely, to a large extent, on voluntary cooperation and on information from informants."

ent position that the exemption terminates when it is decided that no further enforcement action will be taken by the agency (Pet. App. B 14–15). The statute, however, exempts from disclosure "investigatory files compiled for law enforcement purposes" and makes no reference to whether the investigation has been completed or whether further enforcement action is contemplated. "A file is no less compiled for law enforcement purposes because after the compilation it is decided for some reason there will be no enforcement proceeding." *Cowles Communications, Inc.* v. *Department of Justice,* 325 F. Supp. 726 (N.D. Cal.).

The legislative history does not support petitioner's contention that the exemption terminates when the investigation is completed. Although an exemption for investigatory files was originally proposed for the limited purpose of protecting against premature disclosure of the government's case in court,[8] that narrow language was rejected on the floor of the Senate in the 88th Congress in favor of language substantially identical to that ultimately adopted as part of the

[8] An exemption considered by the Senate Committee on the Judiciary in the 88th Congress would have covered "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein * * *," S. 1666, as amended, 88th Cong.; 110 Cong. Rec. 17087. Reporting the bill in that form the Committee noted: "The exemption covers investigatory files in general, but is limited in time of application." S. Rep. No. 1219, 88th Cong., 2d Sess., p. 14.

Act by the 89th Congress.[9] Some courts, in decisions relied upon by the dissenting judge below (Pet. App. B 14–15), have correctly observed that the original purpose continues to be served by the broader language of the Act as passed. But this hardly suggests that the court below erred in recognizing an additional purpose of the exemption: to preserve the confidentiality of the procedures by which the agency conducted its investigation and obtained its information. This purpose could, of course, be frustrated if disclosure were required upon completion of an investigation or upon a determination that no further enforcement action will be taken in the particular case.

If, for the reasons petitioners assert, the investigatory files exemption were unavailable here, it is difficult to see why the files of the FBI could not similarly be examined by "any person," contrary to the express understanding of the Congressional Committees that recommended passage of the Act.[10] Moreover, under petitioners' theory the government could not ordinarily

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[9] After the Senate had passed the bill in the 88th Congress, Senator Humphrey moved for reconsideration and offered an exemption that would have covered "investigatory files" without qualification. Senator Long found this suggestion "valuable" and offered, as a substitute to accomplish the same objective, the language that was finally adopted by the next Congress. See 110 Cong. Rec. 17667–17668.

[10] H. Rep. No. 1497, 89th Cong., 2d Sess., p. 2; S. Rep. No. 813, 89th Cong., 1st Sess., p. 3; 112 Cong. Rec. 13659. See also the President's comments upon signing the bill, contained in Committee Print, Senate Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary, "The Freedom of Information Act" (Ten Months Review), 90th Cong., 2d Sess., p. 5 (1968).

protect the identity of informants, which the investigatory files would reveal.[12]

The court below thus properly concluded that the Act's purposes would not be served by requiring disclosure of investigatory files when the investigation terminates or when the agency decides to take no further enforcement action. See also *Evans* v. *Department of Transportation*, 446 F. 2d 821 (C.A. 5), certiorari denied, 405 U.S. 918; *Cowles Communications, Inc.* v. *Department of Justice*, 325 F. Supp. 726 (N.D. Cal.).[13]

2. The court's decision is not in conflict with that of any other court of appeals. Contrary to petitioners' assertion (Pet. 6), with which the dissenting judge apparently agreed (Pet. App. B 14), there is no conflict with *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935 (C.A. D.C.), certiorari denied, 400 U.S. 824. The question there was not the vitality of

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[12] Petitioners assert that "[i]n this case, the SEC has already revealed the identity of its informants" (Pet. 7). The Commission does not voluntarily reveal even whether a confidential informant exists, much less his identity, and has not done so here. The fact that the Commission has often been willing to disclose the names of witnesses who formally testified under oath in its investigation has nothing whatever to do with revealing the identity of informants who might thereby be placed in jeopardy.

[13] The exemption permits disclosure of the files "to the extent available by law to a party other than an agency." This provision, which was intended to require disclosure of the prior statements of witnesses called in an enforcement proceeding (see 110 Cong. Rec. 17667–17668), is not applicable here.

the exemption after an investigation and enforcement proceedings have been terminated; it was whether the particular files had been compiled for law enforcement purposes as contrasted with rulemaking purposes.[14] The court noted that what had commenced as an investigation for the purpose of adjudicatory law enforcement proceedings had turned into an investigation for rulemaking purposes some two years before the request for disclosure. In these circumstances, it held that in order to sustain its burden of showing the applicability of the exemption, the agency must show a current intention to use the files for enforcement purposes. The decision thus does not speak to the problem in the instant case, where the files were unquestionably compiled for law enforcement purposes.

Similarly, the holding in *Wellford* v. *Hardin,* 444 F. 2d 21 (C.A. 4), also relied upon by petitioners, was that the records in question—"[w]arning letters and reports of detention" addressed to meat and poultry packers—were not part of an "investigatory file" in the sense contemplated by the Act. They were instead "records of administrative actions taken to enforce the law" (444 F. 2d 24–25). There is no conflict with the decision below, because it is unquestioned that the files here contain the fruits of the agency's information-gathering efforts directed toward law enforcement.

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[14] The "threshold question" was "whether the files sought by Bristol-Myers relate to anything that can fairly be characterized as an enforcement proceeding" (424 F. 2d at 939).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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